SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 46

VIRGIL HERDMAN, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Southern District of Ohio	1	1
Relevant docket entries	1	1
Amended complaint	3	2
Answer	5	4
Partial transcript of proceedings	6	5
Appearances	7	5
Testimony of Virgil Herdman—		
Direct	7	5
Cross	39	28
Redirect	53	38
Recross	54	39
Redirect	55	39
Recross	56	40
Court's Statement	57	40
Reporter's certificate (omitted in printing)	60	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956

—407-7

	Original	Print
Record from the United States District Court for the Southern District of Ohio—Continued		
Direction to enter judgment	61	43
Entry overruling motion for new trial	61	44
Notice of appeal (omitted in printing)	62	
Proceedings in the United States Court of Appeals for the Sixth Circuit	63	44
Argument and submission	64	44
Judgment	64	44
Clerk's certificate (omitted in printing)	65	
Order allowing certiorari	66	45

[fol. 1] **IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

Civil No. 3235

VIRGIL HERDMAN, 714½ N. High Street, Columbus, Ohio,
Plaintiff,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, a corporation,
Defendant

RELEVANT DOCKET ENTRIES

1951

August 13. Complaint filed.
August 13. Summons and copy Complaint to M. S. D. O.
September 8. Summons returned executed on 8-27-51—filed. Fees 2.20.
September 13. Answer of defendant filed.

1952

January 12. Interrogatories of plaintiff filed.
January 23. Plaintiffs trial brief filed.
February 25. Answer to Interrogatories filed.
July 7. Motion of plaintiff for production of documents, etc. filed.
August 7. Trial brief of defendant filed.
August 15. Memo of defendant contra plaintiffs motion filed.
[fol. 2] September 3. Reply memo of plaintiff filed.
September 30. Memo—motion for production, etc. overruled filed—Entry.
October 10. Entry on memo of 9-30-52 filed.

1953

February 3. Interrogatories filed.
April 1. Answer to interrogatories filed.
September 14. Deposition of Chas. L. McGee—filed.
September 17. Deposition of Chas. L. McGee—filed (supp.).

1954

January 21. Motion of plaintiff for leave to amend filed.
January 21. Entry granting leave to file amended complaint filed.
January 21. Amended complaint filed.
January 21. Answer to original complaint refiled to Amended complaint.
January 22. Trial—Jury empaneled & sworn—Test. on behalf plff. Test. not concluded—adj. 10:00 A.M.
January 25. Trial continued—Test. on behalf plaintiff—concluded. Plff. rests—Motion of defendant for directed verdict—motion sustained.
January 25. Verdict filed.
January 25. Judgment for defendant filed.
February 2. Motion of plaintiff for new trial filed.
February 2. Motion of plaintiff to extend time for filing of brief in support of motion for new trial filed—approved.
February 3. Subpoenas (3) returned executed and filed.
December 17. Entry overruling motion for new trial filed.
December 17. Notice of appeal filed—copy mailed R. L. Barton.

[fol. 3] 1954

December 17. Bond on appeal filed.
December 17. Statement of points relied upon filed.
December 17. Reporters transcript filed.
December 17. Designation of record on appeal filed.

1955

January 12. Transcript of record on appeal to U. S. Court of Appeals.

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT—Filed January 21, 1954

1

Defendant is a railroad corporation organized and existing under the laws of the State of Pennsylvania and was

at all times hereinafter mentioned, and is now, carrying on business within the jurisdiction of this court as an interstate common carrier of passengers and freight into and from various states of the union, a portion of whose tracks extend into and through the City of Columbus, County of Franklin, State of Ohio. Plaintiff's cause of action hereinafter set forth arises under the Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149 and amendments thereto, commonly known as the Federal Employers Liability Act, 45 U.S.C.A. Secs. 51-59. Plaintiff is a resident of the State of Ohio.

2

On or about February 1, 1951, plaintiff was employed by the defendant as a freight conductor in the furtherance of interstate commerce. On that date plaintiff was working [fol. 4] for defendant and was riding in the caboose of an east bound train being operated by the defendant in or near the City of Dayton, Ohio. Without warning to plaintiff, defendant caused its train to make a sudden emergency stop which caused plaintiff to be thrown violently from one end of the caboose against the wall of the opposite end of the caboose and then onto the floor resulting in injuries to the plaintiff as hereinafter set forth in greater detail.

3

At all times hereinafter mentioned the locomotives, freight cars and caboose making up the entire train on which plaintiff was riding on or about February 1, 1951 was under the sole and exclusive control and operation of the defendant and plaintiff's injuries were the direct and proximate result of defendant's control and operation of said train.

4

Plaintiff's injuries were the direct and proximate result of the negligence of the defendant in one or more of the following particulars, to-wit:

1. Defendant failed to provide plaintiff with a reasonably safe place to work.
2. Defendant so operated its train as to throw it into an emergency stop causing plaintiff to be thrown from one end

of his caboose into and against the wall and floor at the other end of the caboose.

3. Defendant failed to warn plaintiff of the sudden emergency stop.

5

As a direct and proximate result of the negligence of the [fol. 5] defendant as aforesaid, plaintiff received a severe blow to his head, shoulder, back and hip causing injuries to the bones, muscles, tissues, blood vessels and nerves of the head, neck, back and lower extremities. As a result of said injuries plaintiff was totally disabled and required medical care; he incurred medical expense and continues to remain totally disabled. Said injuries have caused plaintiff to be sick, sore, lame and disabled and necessitate the use of a cane by plaintiff in movement. Plaintiff will continue to incur additional medical expense in the future, the exact amount of which cannot now be stated, all to plaintiff's damage in the sum of $75,000.00.

Wherefore, plaintiff prays judgment against the defendant in the sum of $75,000.00 and his costs herein expended.

(S.) Kenneth Agee, Attorney for Pltf.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

(S.) Kenneth Agee, Attorney for Pltf.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed September 13, 1951

1. Now comes the defendant, The Pennsylvania Railroad Company, and for its answer to the complaint of the plaintiff filed in this case admits all of the allegations contained in the first paragraph of the plaintiff's complaint.

[fol. 6] 2. Defendant admits that on or about February 1, 1951, the plaintiff was employed by the defendant as a freight conductor in the furtherance of interstate commerce. Defendant further admits that on said date the plaintiff was working for the defendant and was riding in a caboose of an eastbound train being operated by the defendant in

or near the City of Dayton, Ohio. The defendant denies all of the other allegations contained in Paragraph 2.

3. Defendant denies all of the allegations set forth in Paragraph 3 of the plaintiff's complaint.

4. For want of definite information the defendant denies all of the allegations contained in Paragraph 4 of the plaintiff's complaint.

Wherefore, having fully answered, defendant prays that the complaint of the plaintiff may be dismissed and that the defendant may go hence with its costs.

Bricker, Marburger, Evatt and Barton. By (S.) Robert L. Barton, Attorneys for Defendant.

Copy mailed to Kenneth Agee, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

Partial Transcript of Proceedings—January 22, 1954
(Filed December 17, 1954.)

Before Honorable Lester L. Cecil, Judge, At Columbus, Ohio, and a Jury.

[fol. 7] APPEARANCES:

For the Plaintiff: Donald McNamara, Esq.
For the Defendant: Robert L. Barton, Esq., John Eckler, Esq.

Morning Session
Friday, January 22, 1954

Mr. VIRGIL HERDMAN, being duly sworn, testified as follows:

Direct Examination.

By Mr. McNamara:

Q. Will you state your name please?
A. Virgil Herdman.
Q. Where do you live, Virgil?
A. I stay with my dad and mother, Leon, West Virginia.

Q. And did you tell somebody there?

A. I asked my engineer what happened over on the west side.

[fol. 28] Q. I don't want to get into any conversation, what you told him. Did you report to him or report to anybody that you had been injured?

A. Told both engineers.

Q. That is, on both the steam engine and the Diesel?

A. And the Diesel.

Q. When you were running under such a situation as you were running there, as I understand it, the steam engine was out in front and the Diesel behind it? Is that right?

A. Right.

Q. Can the engineer on the Diesel, by means of that braking lever control the air braking situation?

A. He would have to have went past his instructions and his authority to cut his air back. His cut-out cock, they call it. The man on the second engine doesn't have control. The front man has the control.

Q. Is it possible for the man on the second—the engineer on the second locomotive to cut off the air?

A. He could have turned his cut-out cock and could have did it.

Q. Is there any way, riding back in the caboose that you could tell which locomotive might have caused the cut off of the air?

A. No, sir.

Q. After you got into Clement yards and you switched cars, then where did you go?

A. Came on toward Columbus.

Q. Came on to Columbus that same day?

A. That is right.

[fol. 29] Q. And when you arrived in Columbus, did you make some report of this incident?

A. Yes, sir.

Q. And to whom did you report such a thing?

A. It was near midnight when we got in and I reported it over to the yard office, to the clerk, and got a cab to the house.

Q. That is to your house?

A. Yes, my room.

Q. Do they live right in town?
A. No, back in the rural district.
Q. That is R.F.D.?
A. R. F. D. 1, yes.
Q. About how far out of Leon, do you live?
A. Two miles.
Q. Two miles?
[fol. 8] A. Yes, sir.
Q. And what part of West Virginia is Leon located in?
A. It is in Cologne District, County of Mason.
Q. How old are you, Virgil?
A. Past fifty.
Q. When did you go to work for the Pennsylvania Railroad?
A. In 1929.
Q. And where did you go to work for them, Virgil?
A. On the Toledo Division.
Q. On the what?
A. Toledo Division.
Q. As I understand it——
A. Toledo Division over here in Columbus.
Q. All right. When you went to work on the Toledo Division, did you come to Columbus to go to work?
A. I hired out here.
Q. Where had you been living then, down in West Virginia?
A. Yes, part of that time.
Q. Where were you raised?
A. I am a native, born and raised down there.
Q. And you hired out to the Pennsylvania Railroad in 1929. That was here in Columbus?
A. Yes, sir.
Q. What was the nature of your work then, when you hired in?
A. Train service, brakeman.
[fol. 9] Q. As a brakeman. Did you continue to work for the Pennsylvania Rairoad regularly, from then on until 1951?
A. Yes, sir, except when I was furloughed. Once in a while you get furloughed. I was still on the roster and always to be called.
Q. By furloughed, you mean just laid off?

A. Reduction of force.

Q. And then they called you back, according to seniority; is that it?

A. That is right.

Q. Did you continue to work in what is known as train service for the railroad?

A. Yes, sir.

Q. And have you always been in the train service?

A. Yes, sir.

Q. During that period of time, did you ever do any other work, except as a brakeman? Did you work as fireman?

A. They used to use us as firemen now and then. When they was short of firemen, they would call us brakemen.

Q. You have served as fireman?

A. Yes, sir.

Q. Did you ever serve as engineer?

A. No, sir.

Q. You have worked up in the locomotives?

A. Yes, sir.

Q. Back in 1951, during the month of January 1951, had you been working for the Pennsylvania Railroad?

[fol. 10] A. Yes, sir.

Q. And about how much of that month did you work, do you recall?

A. I can't exactly remember the dates. I had pneumonia in December and went back to work in January and I don't remember the exact dates.

Q. Did you work as much as half of January, do you think, or was it even less than that?

A. Well, I don't remember.

Q. Now, Mr. Herdman, did you have any particular run while you were working for the Pennsylvania Railroad in 1951?

A. Yes, sir.

Q. And will you tell us where that run was?

A. That was a regular run from Columbus, Ohio, to Richmond, Indiana and return.

Q. Now, did you have regular hours when you would go to work and when you would come back?

A. Well, supposed to have regular hours, but we never got in in time to get out like that.

Q. Would you normally leave Columbus any particular time of day?

A. Whenever they could get the train ready and called us.

Q. Did this train have any particular number or identification?

A. They had a symbol.

Q. By symbol——

A. CN7 and 8.

Q. What did that stand for? Is that the identification of the train?

[fol. 11] A. That was just one of the symbols that the company put on it.

Q. Now, when you say you worked from here to Richmond and back, will you explain—Did you have a title at that time?

A. What do you mean? I was conductor.

Q. That is what I mean. You were freight conductor?

A. That's right.

Q. Explain what the nature of the work is? What does a freight conductor do?

A. Well, he is in charge of the train and the bills, doing the writing and setting off of the cars, picking up cars.

Q. All right. Now, as a freight conductor, do you always ride on one particular end of the train?

A. Well, ordinarily do unless something unexpected happens and you have to go elsewhere.

Q. Ordinarily you ride in the caboose, is that right?

A. That's right.

Q. Ordinarly, does somebody else ride back there with you?

A. Flagman.

Q. You and the flagman as a rule are all who ride in the caboose?

A. Usually, yes.

Q. Now about how long a run was it from Columbus to Richmond, or Richmond back to Columbus?

A. I think our schedule was 114 miles.

Q. And about how much time element was usually involved in making that run?

[fol. 12] A. Well, that varied very much, on account of passenger trains.

Rusoff? I mean professionally speaking. When did you see him for treatment or examination or anything, or did you ever see him again?

A. I seen him, yes.

Q. You have seen him. He has examined you, as I understand it, recently?

A. Right. I can't tell you what date it was.

Q. Between September 1951 and recently had you seen Dr. Rusoff?

A. It has been this week.

Q. Before this week, had you seen Dr. Rusoff for treatment since September 1951?

A. No. I went to an osteopath clinic.

Q. Where did you go to that clinic?

A. Point Pleasant, West Virginia.

Q. Do you know about when you went to that clinic?

A. Well, the doctor came to my father's house to see me immediately after I went down there to stay and they—either came there or I would have—if I would be able they took me to the doctor, hospital and clinic once a week.

Q. Did you have treatment at the clinic, Virgil?

A. I did.

Q. Will you describe what kind of treatment you got?

A. They used heat treatments; they used massage; they used medicine.

[fol. 33] Q. Were you at that clinic and received treatment on more than one occasion?

A. Oh, I went there for several months.

Q. And how frequently would you go there—would you go more than once a month?

A. Once a week.

Q. Did you pay for those doctor calls or trips?

A. I did.

Q. Do you remember about what they cost you?

A. It run anywhere from $7 to $15 every week, every trip.

Q. Then did you have any other medical treatment, Virgil, after you stopped going to that clinic? Did you have any further medical treatment?

A. I have been to other hospitals, been x-rayed. But as far as medical treatment or taking medicine, no.

Q. That means you would take sidings or stay in the yards and wait for the regular passenger trains?

A. That's right. Maybe the yard wouldn't release us or something like that.

Q. And did you normally make the run over and back the same day?

A. Usually, yes.

Q. You would go to Richmond——

A. It was a seven-day job. We would go east one day and west the next.

Q. You didn't make the complete round trip in one day?

A. No. We laid over in Richmond.

Q. And then came back the next day?

A. Yes and laid over in Columbus and then go back to Richmond the following day.

Q. At that particular time you say it was a seven-day job?

A. It was.

Q. You didn't have Saturday and Sunday off?

A. No time off.

Q. Can you tell us reasonably close the manner in which you were being paid, on or about February 1, 1951?

A. Well, it is based on mileage and overtime. There was a limit up to a certain amount of miles and then overtime started.

Q. How often did you get paid on the railroad?

A. Twice a month.

[fol. 13] Q. And can you tell me about what your average day's pay was, or your average pay-period pay was, at that time?

A. Well, that varied for reasons of overtime involved and amount of hours.

Q. When you normally worked a full pay period about what was your average pay?

A. Oh, sometimes it would be two hundred or more; sometimes a little less.

Q. Now by full pay period, I mean just half the month; is that right? Your pay sometimes would run as high as two hundred?

A. Sometimes over two hundred; sometimes less.

Q. What would be its unusual low limits? Would you ever make as little as $100 during that time?

A. Not unless you would have to lay off for some reason.

Q. Not unless you were off work?

A. That's right. If you had some reason for being off, you didn't get paid for it.

Q. Virgil, what was the work that a conductor would do with those bills that you referred to? When you would start out on a run, what did you do with the bills?

A. Well, we had to check them, read them, write them up and just charge the bills wherever we had cars to set off.

Q. Did you have a bill for each freight car?

A. We were supposed to.

Q. That is the way they set them up?

[fol. 14] A. That's right.

Q. You have one bill for each freight car?

A. That's right.

Q. Are those given to the freight conductor when the train pulls out of the yard?

A. They are given to the yard master or one of his clerks, usually give them to you prior to departing from the yard.

Q. So you did have them at the time you departed?

A. That's right.

Q. And then as the train goes along between Columbus and Richmond, or Richmond and Columbus, do they usually set cars off from time to time, at various places?

Mr. Barton: I don't like to interrupt. I don't see the materiality of this testimony as to the accident that took place on this day, and that is all this jury is interested in.

Mr. McNamara: Well, you may be right. I just want to show their general activities, the nature of the work of the conductor, what he was supposed to do, the general movement of the train, and if the Court thinks we are far afield, we will stop.

The Court: Without going too much in detail, I think you may show it.

Q. Now was it your duty to hand off these bills at wherever you would stop and leave freight cars, or pick up freight cars?

A. Yes, sir.

Q. Going back to the morning of February 1, 1951, do

[fol. 15] you recall that particular day and where you started with your train that day?

A. At Richmond, Indiana.

Q. Had you laid over in Richmond the night before?

A. Yes, sir.

Q. And when your train was made up at Richmond and you started out, where did you start for?

A. Columbus.

Q. Your destination was Columbus?

A. Right.

Q. Do you remember about what time of day you pulled out of the yards or left the yards at Richmond?

A. I don't remember, but we had to keep reports, delay reports of the particular time and even write it up on our wheel reports, but I can't remember the time.

Q. You think you left in the morning. Do you think you left in the morning or the afternoon?

A. Well, it was near noon. It wasn't early in the morning.

Q. Do you remember when you left Richmond that day what your train consisted of?

A. Well, we had a steam locomotive and a Diesel locomotive and I don't remember exactly, sixty some bills and the caboose.

Q. If you had sixty some bills, you would also have sixty some freight cars; is that correct?

A. We should have, yes.

Q. Now, between Richmond and Dayton was there any-[fol. 16] thing particular happened that you remember in reference to your train between those two cities?

A. No, just regular performance, regular run.

Q. Where were you riding in the caboose, do you recall, as you came into the city of Dayton?

A. Well, we was in the rear end.

Q. Do you recall the name of the flagman who was with you?

A. It seems to me that his name was Ford, but he was a stranger to me. That is the only trip that I ever seen the man.

Q. Now, as you came and was riding through the city of Dayton, can you describe a little bit what the caboose looks like on the inside and where you were?

A. Well, we were sitting on a bunk in the west end.

Q. West end would be towards the rear end of the caboose?

A. It was the rear end. We was eastbound.

Q. Was the bunk on the north or south side?

A. The bunk was on the south side or right side. It was coming east.

Q. What else generally is there in that caboose?

A. Oh, there is a stove and table, some lockers, two other bunks and a cupola with steps to get up in the loft, if necessary to ride up there.

Q. Would you tell what type of caboose was this, was it wooden or metal?

A. It was an old type, wooden caboose.

Q. Did it have in it any type of communications system [fol. 17] with the locomotive?

A. No, sir.

Q. As you came through the city of Dayton, will you describe just what happened, Virgil?

A. Well, we were coming through there at a slow like speed and I don't know what went wrong, the train went in emergency and threw me into this table and tore it up and I was up on the floor with my flagman on top of me, when we finally got straightened up.

Q. Virgil, when the train went into what you call an emergency situation or emergency brake situation, does it make any noise? Did you hear anything?

A. Well, there is a noise whenever it goes in but I didn't have time to do anything about it.

Q. What happens to the wheels on a train when it goes into an emergency braking situation?

A. They lock.

Q. The wheels are locked?

A. If the air brakes are perfectly working it will lock the wheels on the car.

Q. Now will you explain how freight cars generally are coupled together?

A. Well, we have a drawbar in each end of the car and in this drawbar are knuckles that open hinge-like; they open and close, so when the cars come together and they go together and close, they lock.

Q. When they lock, do they lock perfectly tight or is [fol. 18] there a certain amount of leeway?

A. Well, they lock but it wouldn't be locked perfectly tight, you know; there would be a little bit of movement there.

Q. And what is that movement called?

A. Well, slack.

Q. About how much slack action is there between each of two freight cars, or in each coupling?

A. Well, they vary. Different type cars could have a different slack, some of them more than others.

Q. Would you explain what the least amount of slack action is in the average car?

A. Oh, I would say maybe six inches or a little more.

Q. And is that——

A. In a drawbar, that is to the end of each and every drawbar.

Q. What is a drawbar for?

A. That is to couple; that is the iron that pulls the other part of the train.

Q. Are there springs in that coupling also?

A. There is yokes back of the drawbar with coil springs.

Q. When the train goes into emergency situation, in the braking situation, what happens to that slack?

A. Well, it is stretched out. It bunches it. They run up together solid.

Q. That is, the rear cars are forward?

A. They run in the direction that they were traveling.

[fol. 19] Q. Will you explain what the braking situation was on that train? What type of brakes was there on that train?

A. Well, there is various type brakes. Most of the later equipment is what they call the A-B.

Q. I mean on this particular type of train. I understand that it is an air——

A. It was a regular air.

Q. It is an air brake?

A. That's right.

Q. It isn't a mechanical brake where you push a lever and push one piece of metal against the other. Now will

you describe just how the air brakes on this train function, what makes them work and how they work?

A. Yes. There is a train line, an air hose which is connected from one car to the other, and the engine has air pumps up there that charges or pumps up the entire train and it is controlled, you know, by the engineer or the man operating the engine.

Q. What kind of control is there on the locomotive that operates this brake?

A. They have a control valve.

Q. Will you explain how it is operated? How does the engineer operate that?

A. Well, when he has his engine on, he will have his control valve in whatever position he desires, or is necessary for him to either pump the train up, train lines. Pump it up releases the brakes and when he draws off the air that will apply the brakes.

[fol. 20] Q. Now how does this braking device operate? Is it operated by foot or hand?

A. Hand.

Q. It is a hand lever?

A. Hand control, yes.

Q. And as the engineer sits on the seat box, what they call the seat box up there, where is this hand lever with reference to his position, generally speaking?

A. Just a little bit to the front and a little bit, maybe, to the left of the engineer.

Q. It is in front of him?

A. Yes, a little forward and to the left.

Q. And is it pretty much in the same location in all steam locomotives?

A. Well, yes.

Q. So that this particular type of steam locomotive wouldn't have been different from any other type of steam locomotive?

A. Not very much.

Q. All right. Now, is there a gauge or something up there that they can tell about this air pressure?

A. Sure.

Q. And is that directly in front of the engineer some place or other?

A. That's right.

Q. What would be normal air pressure?

A. About seventy pounds.

[fol. 21] Q. Is there some sort of thermometer-like device or something?

A. There is gauges.

Q. And is the gauge marked so you can tell when it is seventy or fifty pounds?

A. It has got figures on it.

Q. Is there a similar device back in the caboose?

A. There is an air gauge.

Q. There is an air gauge. And does it record back in the caboose just the same as it records at the other end, in the locomotive?

A. Well, it registers. If you get a leaky train line, it might be a little bit less than what the engineer's was, but it would tell you you had pressure, your air was high or low.

Q. As you were riding in that caboose that particular day, coming in towards Dayton, do you recall whether or not you ever looked at that particular air gauge?

A. Well, it had been up to standard before.

Q. It had been near the seventy-pound mark then?

A. Yes, sir.

Q. And that is about standard, you say?

A. That is right.

Q. Now how does that air come from one car to the next?

Q. By going through the train line and through those air hose.

Q. What is a train line?

A. It is an iron pipe that is fitted on each and every car and it has an air hose connected on the end. Whenever they are connected by hand they interlock so as to have air [fol. 22] over whatever amount of distance that you want, say for each and every car in the train.

Q. What you refer to as a train line, that is an actual pipe or something?

A. That is an actual pipe and the air hose is flexible.

Q. That is the coupling that you couple in between the cars that holds the air line together?

A. That's right.

Q. Whereabouts on the freight cars is this train line?

A. Underneath.

Q. It is on the bottom side of it. So that by coupling the hose between each car, you have a continuous line of air pressure; is that right?

A. That is right.

Q. Now is the air pressure on each car controlled and regulated by the locomotive?

A. Yes, sir.

Q. Does that lever up there regulate all the——

A. That will control the brakes on the entire train.

Q. After this emergency braking situation occurred and you said you were thrown, then what happened, Virgil,—what did you do next?

A. Well, as soon as I could, I got up. I looked at my gauge. I see we didn't have any air and I got off and I started the best I could to go towards the engine to see what the trouble was, and I got a very few cars, why, air started to release and I hopped back toward the caboose. I knew then there weren't any broken hose or broken train [fol. 23] lines or busted hose, or anything to cause it.

Q. Then what did you do, get back into the caboose?

A. I got back into the caboose.

Q. When you say you had walked a few cars forward and you heard the air coming in the line, is there some noise or something that you could hear?

A. Yes, there is a noise, when the air is coming back. You can hear the hissing noise when this air pumps up and starts releasing the pistons.

Q. When the engineer released the pistons in the locomotive, the air come back through the line again?

A. That's right.

Q. And you can hear the hissing noise as the air comes back through the line?

A. Yes, sir.

Q. What does that hissing noise tell you?

A. It told me my train line and air hose and everything were all right.

Q. But if the air hose had been broken, as I understand it, it wouldn't have been possible then for the air to get all the way back to the caboose?

A. It couldn't get back to the caboose.

Q. What does that tell you in your railroad knowledge as to what caused the emergency braking situation?

A. Something went on on the front end.

[fol. 24] Q. And by the front end you mean the locomotive?

A. Well, yes, upon the engine.

The Court: I think we will take our noon recess at this time. Return at two o'clock. Keep in mind the admonitions which I have given you, please.

Thereupon the further proceedings in the trial of this cause were adjourned until 2 o'clock of the afternoon of the same day.

Afternoon Session

Friday, January 22, 1954.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the trial of this cause proceeded, as follows:

Mr. VIRGIL HERDMAN resumed the witness stand and testified further on direct-examination, as follows:

By Mr. McNamara:

Mr. McNamara: Read the last question and answer.

(Thereupon the last Q. and A. thereto were read by the reporter.)

Mr. McNamara: That noise you heard along side the car and apparently I asked you what that told you and then you gave the answer: Something went on up in the front end.

Q. Then, Virgil, after being outside and along side of the freight cars and hearing that noise, then what did you do?

A. I went back and got on the caboose and looked at my air gauge.

[fol. 25] Q. Do you remember looking at your air gauge? Do you remember anything about it?

A. Certainly. That was one of my duties.

Q. What did the air gauge show you then?

A. The hand starts coming up, you are getting the pressure back.

Q. Hand goes up as the pressure increases, is that it?

A. That's right, to release the brakes.

Q. How do you get increased air pressure on that gauge?

A. The engineer up on his control valve, when he puts that in release, it starts pumping the air back to the rear end or to the rest of the train.

Q. And that is a mechanical device controlled up in the locomotive; is that it?

A. It is hand operated.

Q. Is that the same device that they put the brake on with?

A. Yes, sir.

Q. And then describe what happened after you got back in—what did you do?

A. Well, they started and, you know, so they could get the brakes released, the train started and he proceeded on.

Q. Eastwardly that would be, in a general direction to Columbus?

A. That's right.

Q. Forward direction. Virgil, this area, when you got out of the caboose after that spill,—can you describe what the area is like around there?

[fol. 26] A. Well, it is residential and, I don't know, factories and different things, little stores and cafeterias.

Q. Do you know, is it primarily a residential district along there?

A. Well, there seemed to be a lot of dwellings through there.

Q. Is that one of the better residential sections of Dayton?

A. I am not that well acquainted about the town. I don't know whether it is a classy place.

Q. All right. Virgil, do you know where you were in reference to any stop that you were to make, or do you know where your next stop would have been, if you had continued?

A. Up to Clement yards.

Q. Now is Clement yards still inside of the city of Dayton?

A. Yes. It is up there near the airport.

Q. Did you go on to Clementyard, after you got back into the caboose?

A. Yes, sir.

Q. And about how far did this emergency braking incident occur and your injury occur, from where the Clement yards was?

A. Oh, it would be close to three miles.

Q. Now, you had with you bills that represented each freight car. Do you know whether or not you were supposed to make a stop at Clement yards?

A. Certainly. It was a regular place to set off cars and pick up cars.

Q. Was there any place where you were supposed to [fol. 27] stop in the vicinity of where this incident occurred?

A. No, sir.

Q. Now had you yet reached what is known as the Dayton yards?

A. We hadn't reached the Dayton yard office. We were in the yard limits.

Q. In the yard limits, but you hadn't yet reached the actual office?

A. No, sir.

Q. Is it at the office where you put out the bills and pick up the bills?

A. Yes, sir.

Q. Do you remember on this particular day whether you had bills to put out or not?

A. We had cars to set off and cars to pick up.

Q. Now that is at the Clement yards?

A. Yes, sir.

Q. Would you have put the bills off at the Dayton yards?

A. That was our instructions, we tossed the bills off at the Dayton yard office as we go by.

Q. And then did you stop at the Clement yards this particular day?

A. Yes, sir.

Q. Did you have occasion to talk to the engineer or anybody at that time and tell them about what happened to yourself?

A. Yes, sir.

Q. Virgil, will you describe what your physical condition was after this spill and on your ride back in to Columbus?

A. I was sore and aching and I can't hardly tell you. I was in a lot of misery.

Q. Can you describe what part of your body ached or was sore?

A. Well, my head and my back and my hip.

Q. Then after you went home that night, did you see a doctor some time or other?

A. I did.

Q. And what doctor did you go to?

A. Dr. Rusoff.

Q. Is that Maurice or M. B. Rusoff?

A. That's right.

Q. And is that here in Columbus?

A. Yes, sir.

Q. Do you know where his office was at that time?

A. It was right there on Buttles avenue; No. 9 I think [fol. 30] was his number.

Q. And did you live, generally speaking, up in that vicinity?

A. Very close.

Q. You were living on North High street then?

A. Right.

Q. Do you remember when, in relation to the day of the accident, you went to Dr. Rusoff?

A. Oh, right away, very early, as soon as I could get there.

Q. And will you describe what your physical condition was like some three or four days after this accident?

A. Well, I was a pretty bad beat up man and he was giving me medicine, giving me shots and what-not.

Q. Were your pains, generally speaking, in the same area that they had been?

A. Well, I was so bruised up I—truthfully, at the time I was so much injured I was sore all over.

Q. All right. Now then a week or two or three weeks after the accident, did you continue to have pain in the same general area?

A. Yes, sir.

Q. Was there pain in your back?

A. Yes, sir.

Q. And how did that affect you, Virgil?

A. Well, it's hard for me to try to tell it. I was sore and my leg would go out from under me. I don't know truthfully. In medical terms, I couldn't tell you.

[fol. 31] Q. I just want you to describe how it affected you.

A. It made me sick. I would be sick at my stomach; I was nervous.

Q. Were you able to walk in a normal manner?

A. Not without the assistance of a cane.

Q. Did you start using a cane?

A. Yes, sir.

Q. About how soon after the accident happened, do you recall?

A. Well, it was very soon, but I can't tell you in terms of hours.

Q. Was it in a matter of a week or two?

A. Oh, closer. My daughter went across the street there to a drug store and got me a cane.

Q. And then how long did you use a cane?

A. A long time, several months.

Q. Several months?

A. Yes, sir.

Q. How long did you continue to live in Columbus then, Virgil?

A. I left Columbus in September 1951, following the accident.

Q. Is that when you went back down to West Virginia?

A. Yes, sir.

Q. Now did you see Dr. Rusoff on more than one occasion?

A. Oh, he put me in the hospital and after I was discharged from the hospital he came to the house and I don't know how many—once a day or several days a week.

Q. And over how long a period of time did those treatments or visits from Dr. Rusoff continue?

[fol. 32] A. Up until I went down with my dad and mother, in September.

Q. Then after September, when next did you see Dr.

Q. Did you still have pain during the period of time you were going through that clinic?

A. Certainly did.

Q. Will you describe where your pain was?

A. It is in my lower back and on the right hip, down my right leg.

Q. When you say in your lower back would that be about in the area of where your belt is?

A. I don't know. It is along the belt line.

Q. Down in the vicinity of your belt line?

A. That's right.

[fol. 34] Q. Do you have any pains up higher, Virgil?

A. Well, I haven't for some time.

Q. Those pains are pretty well cleared up?

A. Yes, sir.

Q. Now how long, do you know, have you been free of those pains that were higher up in your back or neck or any place?

A. You know, I couldn't give you a date or anything on that. I am just glad they kind of eased up.

Q. Has it been several months, would you say?

A. Well, it eases up for a while and it comes back every now and then.

Q. It is less frequent now and less severe?

A. It is less frequent than it was to start.

Q. Now what about the pain? Do you still have pain in your low back area?

A. Yes, sir.

Q. And is that pain continuous or does it just come irregular?

Mr. Barton. We object to this form of leading questions.

The Court. Sustain the objection. Let the witness describe.

Q. Just tell us about how it affects you.

A. Well, it is pretty hard for me to try to bend, bend over to tie my shoe, and there is a feeling in there just like something got me, squeezing, or what-not.

Q. Is that a twenty-four-hour-a-day situation?

A. When it comes on, sometimes it lasts for longer than [fol. 35] that, and I can't sleep or do scarcely anything, but just have to sit down and try to stand up or get in position to get relief.

Q. Have you worked any on the railroad since this accident occurred in 1951?

A. I haven't worked anywhere.

Q. Do you personally know the amount of medical expense to Dr. Rusoff?

A. No, I wouldn't be exact, because a lot of times the man came over to the room and he would give me shots and give me medicine and I would pay him and I didn't get any receipt for it and sometimes, when I was able to get over to his office, I would pay.

Q. So you don't know the exact total of his bills?

A. No, I don't.

Q. Virgil, you spoke of being put in the hospital. Now can you tell me about when in reference to this accident that you were in a hospital?

A. Well, it wasn't very many days after the injury, but I can't tell you the correct date.

Q. What hospital were you in?

A. White Cross.

Q. As I understand it, you were in the hospital for a rectal condition?

A. Yes.

Q. And was it Dr. Rusoff that put you in the hospital?

A. He was the one recommended it, made the appointment and got the space for me.

[fol. 36] Q. Now, the condition that existed at that time you went to the hospital, had it ever existed before the accident took place?

A. No, sir.

Q. While you were riding in the caboose, at the time of the accident, in Dayton or before that, was there anything that you could do to control the movement of the train or the braking situation?

A. The engineer in the head end has control of that air.

Q. There are no levers, no nothing——

A. There is a conductor's valve, if it was necessary, or I had reasons to stop him, I could have blowed the air. But it was nothing touched; you know, unless we would have a broken journal or something like that would develop.

Q. When you speak of a broken journal, you mean the journal box?

A. Yes, the axle on the wheels.

Q. The end of the axle is called the journal box?

A. Yes.

Q. During all the time you worked on the railroad had this emergency braking situation—could you tell me about how many times you had ever been in a caboose when that situation arose?

A. Well, it is not a common occurrence. Now and then it happens, but the train line would happen to break or, you know, air hose would bust.

Q. Now, when you say not a common occurrence, it is common, a common knowledge though, isn't it?

A. Well, it is something that we know about.

Q. Is it something you can do anything about when you [fol. 37] are riding in the caboose?

A. No, sir.

Q. During all the times you worked on the Pennsylvania Railroad, from 1929 to 1951, do you have any idea how many times it ever happened, while you were in a caboose?

A. Oh, I don't—not very many times. Maybe three or four, five times, something like that. I don't know, not very many.

Q. Is there anything provided in the caboose, any kind of hand holds or anything that you can hold onto as you ride along in the caboose?

Mr. Barton: If your Honor please, we object to the leading questions here.

The Court: Yes. I will sustain the objection.

Q. When the train went into emergency brake situation, was there anything you could do to prevent being thrown?

A. No, sir.

Q. In addition to putting the train into an emergency braking situation, is there any other way you can slow down the speed of a train or stop it?

A. Yes. You can make a service application.

Q. Will you explain what a service application of the brake is?

A. Well, that is when the engineer would draw it off gently and let it come to a gradual, easy stop.

Q. And as you make a service application of the brake, does that brake then affect all the cars?

A. It will operate on all the cars that is in operating order.

[fol. 38] Q. I don't know whether I asked you: Do you know about what time of day this incident happened, Virgil?

A. It was near three o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. Still daylight?

A. Yes, sir.

Q. Virgil, before this incident occurred, will you describe what the condition of your back was?

A. Well, I was always a strong man, never had any trouble with my back at all.

Q. Had your back ever been injured before?

A. No, sir.

Q. Before the accident happened had you ever had pains in the back area like you had after the accident happened?

A. No, sir.

Q. Is there anything that affects your feeling or your symptoms?

A. There is something wrong, but I don't know what it is.

Q. Excuse me, if I don't make myself clear. I mean, is there anything in normal living—does lifting or weather or movement or anything affect your back?

A. It does now.

Q. What does?

A. Well, I can't stand to walk very much and I haven't tried lifting or anything like that.

[fol. 39] Q. Virgil, about how long did you use a cane to walk with?

A. Well, I couldn't tell you what month I quit using it. It was after I went to West Virginia.

Q. It was sometime after you went to West Virginia?

A. Yes, sir.

Q. That would have been after September of 1951?

A. Yes, sir.

Mr. McNamara: You may examine.

Cross Examination.

By Mr. Barton:

Q. Mr. Herdman, how old are you?

A. I was fifty years old November 20th.

Q. Are you a married man?

A. I am single.

Q. You referred a little while ago to your daughter. Had you been married?

A. Yes, sir.

Q. And were you divorced?

A. Yes, sir.

Q. And when were you divorced?

A. Well, it was in 1947. I couldn't tell you the exact date.

Q. That was prior to the time of this accident?

A. My wife left me while I was at work New Years Day, 1947, and the divorce came up a few months later and was granted her in Columbus.

Q. You were born and raised in the state of West Virginia?

[fol. 40] A. That is right.

Q. Is that down near where you are living now?

A. It is right on the same spot. The only difference, I was born in an old log cabin and they got a frame building now.

Q. And when did you come to Columbus to work for the Pennsylvania Railroad?

A. 1929.

Q. And did you work for the railroad then, except the times you were furloughed, until February 1, 1951?

A. Yes, sir.

Q. You were a conductor and as conductor you were in charge of this train, were you not?

A. Yes, sir.

Q. And how long had you been a conductor on the Pennsylvania System?

A. I think I was promoted to conductor in 1943.

Q. And then you had been performing the duties of conductor since 1943?

A. Yes, sir.

Q. And on a freight train such as you were working on at this time, the conductor usually rides in the caboose, does he not?

A. It is customary, yes.

Q. And you were riding in the customary place that you had been occupying other times that you had been working as conductor, were you not?

A. Yes, sir.

Q. Now, you had gone to Richmond on the day before this accident, which was January 31st—correct?

[fol. 41] A. Yes, sir.

Q. And what time did you report for duty then while in Richmond?

A. Well, I don't remember the exact time.

Q. Sometime in the morning?

A. The crew dispatchers call us. Sometimes we would be what was known as respite instead of going out on eight hours' rest. If they didn't have a train ready or what, they would set us back, what we call respite. I couldn't tell you about the limit on that day.

Q. Well, you mean recall the exact time, but would it refresh your memory to say that your time slip showed you reported at 5:10 a. m. that morning?

A. I would have to see the time slip before I would say that. I don't remember what time it was.

Q. You just don't remember what time you reported or what time you left Richmond?

A. I don't now, no.

Q. You may have left Richmond sometime fairly early in the morning, or middle of the morning, you just don't recall; is that correct?

A. Well, it wasn't to early in the morning. I wouldn't say the time because I don't remember.

Q. Well, you had been riding in the caboose, had you, from the time you left Richmond until you reached the outskirts of Dayton?

A. Yes, sir.

Q. And what kind of day was it, Mr. Herdman?

A. Oh, it was a cold winter day.

[fol. 42] Q. Very cold winter day and snow was blowing, wasn't it?

A. Blowing?

Q. Snow blowing off the houses and off the train, wasn't it?

A. Yes, sir.

Q. Well, now, as you came into the Dayton yard and as you approached the intersection where this emergency application of brakes was made, just what were you doing?

A. Sitting on a bunk.

Q. You were sitting on a bunk. You sure of that?

A. That is the best of my memory I was sitting on a bunk.

Q. And you couldn't have been standing up watching the air gauge?

A. I might have been attempting to get up, but I don't think I was.

Q. You don't think you were?

A. No.

A. In other words, you think you were sitting on a bunk when the application of brakes was made?

A. That is the best of my memory.

Q. Now, Mr. Herdman, as conductor of that train you were required to file a report, were you not, of any unusual occurrences that happened, any incidents that happened, or anything of that sort at that time?

A. Yes, sir.

Q. And that report was what is known as a CT 75 A?

A. Right.

Q. And did you make such a report in this case?

A. I did.

[fol. 43] Q. And you signed that report?

A. Yes, sir.

Q. And to whom was the report given?

A. To the train master.

Q. And when was the report made?

A. The following day.

Q. And of course, your recollection of what you were doing would have been much better the following day than it is today, wouldn't it?

A. Well, it was fresh in my memory at the time.

Q. And if you said in that CT 75 A report that at the time the stop was made you were standing up, looking at an air gauge, would that have been a correct statement at that time?

A. Well, it could or couldn't have been.

Mr. Barton: Mark this as Defendant's Exhibit A.

Thereupon the CT 75 A report was marked for identification as Defendant's Exhibit A.

Q. Mr. Herdman, I hand you what has been marked for the purposes of identification as Defendant's Exhibit A and I will ask you whether or not that is the CT 75 A report that you prepared and filed the day after this accident happened?

A. That doesn't look like my writing on part of it.

Q. Is that your signature there, Mr. Herdman, where it says, "Virgil Herdman, Conductor"?

A. Yes. I didn't notice that. It might be my handwriting.

Q. Will you read to the jury, please, what you say in that [fol. 44] report immediately above your signature?

A. (Reads) "CN 28, Engine 8800 moving east through Dayton with 67 cars at a speed of eight to ten mile per hour." Now this is what those guys told me. I can't see up there. I don't know. They say that an automobile drove——

Q. Just read what is on the report that you made.

A. (Continues to read) "To prevent striking automobile engineman applied air in emergency causing rough stop." This said I was standing in the caboose.

Q. Just read what it says.

A. I can't make that out.

Q. (Reads) "I was standing in caboose observing air gauge."

Mr. McNamara: We are willing, Mr. Barton read it, if the Court please, if the witness says he can't make it out.

The Witness: This is not my handwriting, Mac and some of that writing is a little bit hard for me.

Mr. McNamara: If it is not your handwriting, say it isn't; if it is, say it is.

The Witness: It is not.

Mr. McNamara: All right.

The Witness: Is that all you want me to read?

Q. You didn't finish reading. Do you want me to read it?

A. Some of those words in there are a little bit hard for me to say what they are intended for.

Q. I see. Now this statement says, and you follow me, [fol. 45] will you, and see if I read it correctly?

A. All right.

Q. (Reads) "CN 28, Engine 8800 and 5680 moving east through Dayton, with 67 cars, at estimated speed of eight or ten miles per hour. Automobile drove over crossing just east of Dayton Rubber Works. To prevent striking automobile engineman applied air in emergency causing rough stop. I was standing in cabin observing air gauge and when stop was made knocked me to floor of cabin bruising my hip." And that is your signature in that statement, is it not, Mr. Herdman?

A. That looks like my signature.

Q. If someone else wrote that, you read it before you signed it, didn't you, Mr. Herdman?

A. I was a pretty bruised up man and I don't remember if I did or not.

Q. You don't remember?

A. No. I usually wouldn't want to sign a blank but I trusted the train master and may have did it, I don't know.

Q. Isn't that the way this accident happened, the way that statement says?

A. The engineer told me that was the way he did it.

Q. And the train was going as you say in there at a slow rate of speed?

A. It wasn't going very fast. We didn't have a speedometer on the rear end to know about the speed, but you know, like we say, an estimated speed, it wasn't going very fast.

[fol. 46] Q. And the engineer told you that he applied the emergency brake to keep from hitting an automobile that come onto the track?

A. He told me that.

Mr. McNamara: I want to object to hearsay and what the engineer told this man is not subject matter for cross examination.

Mr. Barton: I think it is entirely proper on cross-examination.

Mr. McNamara: The engineer is available for testimony.

The Court. I will overrule the objection.

Mr. McNamara: Note exception.

Q. As a matter of fact, Mr. Herdman, in the deposition that Mr. Eckler took from you a few days ago, you told him that the engineer told you that there was a load of school children in an automobile and he stopped to avoid striking that automobile, didn't he?

Mr. McNamara: Objection.

A. The engineer told me that.

Q. Well, now, when Mr. McNamara was discussing with you the manner in which an air brake operated this morning, I think you said that you had been looking at the gauge at or shortly before anyway this accident happened and the air gauge was proper and in a normal position, was it not?

A. Well, it is a duty of a conductor to notice his air gauge.

Q. And you had noticed the air gauge before you went into Dayton or as you were going into Dayton?

A. Yes. We noticed it every now and then.

Q. Well, on this particular occasion you had noticed [fol. 47] the air gauge and noticed that it was proper, hadn't you?

A. Well, before we leave the yards, even after the air man o.k's it, we look for ourselves to know. Sometimes they will give a slip and the yard engine come down with a hot car or something and the yard crew will put another car on and the air man will fail to have the air in the rear end. So, that is the duty of a conductor or flagman to notice those gauges.

Q. I know that is your duty, but what I am asking you is, you did observe this air gauge shortly before this emergency stop took place, didn't you?

A. Well, I can't tell you just where or anything about it, but it was prior to leaving the yards and every now and then between.

Q. You recall when Mr. Eckler took your deposition the other day, don't you, Mr. Herdman?

A. Yes, sir.

Q. Do you recall him asking you this question: "Had you looked at that gauge before the accident?" Remember him asking you that?

A. I don't remember whether he asked me that or not.

Q. Do you remember answering: "Certainly. It was right up to standard." Do you remember answering that?

A. He asked so many questions. I can't remember all of them. I don't have no copy.

Q. Isn't it a fact now that the gauge was up to standard? There was no defect in air or gauge.

A. It had been up to standard.

Q. And it was the last time you looked at it immediately [fol. 48] or shortly before the accident, wasn't it?

A. Yes; it was afterwards.

Q. And it was afterwards. So, there was no defect in the gauge or braking equipment whatsoever of this train, so far as you know, was there?

A. No.

Q. None at all.

A. We didn't have no brakes sticking or anything like that.

Q. That's right. Now within what distance did this train stop after the emergency application of the brakes?

Mr. McNamara: If the witness has any knowledge.

The Court: Yes, if he knows.

Mr. Barton: If he knows.

A. At that speed you would go, oh, maybe somewhere, from three to five, six car lengths.

Q. And was this train on that occasion stopped within three to five to six car lengths?

A. I didn't measure it. I couldn't tell you.

Q. Don't you recall telling Mr. Eckler very definitely just last week that the train stopped from three to five car lengths?

A. I said it would be my judgment it was from three, maybe five or six car lengths.

Q. And that is your judgment now?

A. That's right.

Q. Now you stated, I believe, to Mr. McNamara, that in your experience as a conductor that you had been riding [fol. 49] in a caboose only about four times when the emergency application of brakes was made?

A. I said a few times, maybe three or four, or five times.

Q. Is that all—is that the only times that you have been

riding in a caboose when the emergency application of brakes was made?

A. I have rode in a caboose for years but those emergency stops are not a common occurrence.

Q. That is correct, they were not a common occurrence, but you have been in the cabin many more times than three or four, when the emergency application of brakes was applied, weren't you?

A. Not when we was moving.

Q. Do you ever apply an emergency application of brakes unless you are moving?

A. Well, some people do.

Q. On what occasion would you have to apply an emergency application of brakes, if you were standing still?

A. Wouldn't have any. If you are standing still and someone crosses your train and happens to pull that operating lever, it will lift the lock pin and then the engineer tries to start, the knuckles open up and the hose parts and puts it in emergency.

Q. Haven't you been riding with trains moving on many more occasions than three or four when an emergency application of brakes has been made?

Mr. McNamara: We will object to repetition of that question. It has been answered twice.

The Court: I don't believe he has answered it.

[fol. 50] Overrule the objection.

Mr. McNamara: I think you better read the question back.

(Thereupon the last Q. was read by the reporter.)

A. Well, we never keep a record on that and I wouldn't be exact. Not very many times while we was moving.

Q. Now again let me refer you, Mr. Herdman, to the deposition that was taken by Mr. Eckler on the 22nd day of December of 1953. Do you recall Mr. Eckler asking you this question: "Had you ever ridden in a caboose before when there was an emergency application of steam?" And your answer was: "Many times." Remember that?

A. You said steam.

Q. Yes.

A. That doesn't apply there, the air brakes.

Q. Then you weren't answering here when he——
A. You asked me about steam.
Q. Yes.
A. These brakes are controlled by air.
Q. What is an emergency application of steam?
A. I am not an engineer.
Q. Didn't you have reference here, when he asked you this question, to the emergency application of brakes and didn't you answer "Many times"?
A. I have known of it many times.
Q. His question was had you ever ridden in a caboose, and your answer was "Many times".
A. I had ridden in a caboose many times.
[fol. 51] Q. When there was an emergency application?
A. I know about many emergency applications that apply to the other fellows that I wasn't involved.
Q. Well, now, was there anything different in this application of the emergency brakes than any of the other emergencies that you had experienced?
A. All I know, it was very rough because I was involved.
Q. Well, didn't Mr. Eckler ask you this question: "Was there anything different between this time and the other times?" And wasn't your answer: "We just had no way to avoid it." Didn't you answer Mr. Eckler that way?
A. I don't remember about that answer.
Q. Well, let me show you.
A. Mentally we think of those things, but when it happens we can't do anything about it.
Q. Wasn't that your answer when he asked you "Was there anything different between this time and the other times?" And wasn't your answer: "We just had no way to avoid it"? Wasn't that your answer?
A. We don't have a way of avoiding it.
Q. Wasn't that your answer?
A. I didn't have a way to avoid it. We can think about it but nothing we can do about it. We were just like a man in a ship out there in the middle of the ocean. You may think about it sinking. If it is going to sink, you are going to get wet.
Q. On those other occasions, Mr. Herdman, when there
[fol. 52] had been an emergency application of brakes, had

you received any warning prior to the emergency application?

A. Repeat that, please.

Mr. Barton: Would you read the question?

(Thereupon the last Q. was read by the reporter.)

A. There was no way to receive a warning.

Q. That is right. There is no way to receive a warning when you are in the caboose and the engineer has to instantly put on an emergency application of brakes, is there?

A. It happens instantly.

Q. That is right, it happens instantly. Mr. Eckler asked you at that time "Now on these prior times you had emergency stops, had you been warned?" And your answer that time was "No, sir. You must expect that." Now that is right.

A. We have no way of being warned.

Q. And he asked you: "You didn't expect a warning?" And your answer was "I say, we had to expect it at all times." Now that is right.

A. We can think about it but nothing we can do about it.

Q. And he asked you, "You have to expect an emergency stop?" And your answer: "That's right." Isn't that true?

A. Any time a train line breaks or air hose busts or something like that, it will go in emergency.

Q. And you have to expect also, Mr. Herdman, that when an engineer is confronted with an emergency such as he was in this case, that there might be an emergency application of brakes, don't you?

[fol. 53] Mr. McNamara: We will object to that. It is asking him to suppose what he thinks about what an engineer might do.

The Court: I will overrule the objection.

A. We got to expect them or think about them.

Q. That's right. What time of day was it that this accident occurred, Mr. Herdman?

A. I told you a while ago it was a cold winter day.

Q. What time of day?

A. It was near three o'clock. I wouldn't be exact about the minutes. It was near three o'clock.

Mr. Barton: I think that is all.

Redirect Examination.

By Mr. McNamara:

Q. When you speak of being in charge of the train, you are not in charge of the locomotive and its engineer?

A. No. You are in charge of the train up to the tender and the bills.

Q. It does not include being in charge of the operation of the locomotive?

A. No. The engineer has control of that.

Q. Now he asked you if it was your duty to make a report. As I understand, it is the duty of the conductor to make such reports.

A. Right.

Q. It is not the duty of the engineer or anybody else, is it?

A. I never questioned the engineer about what he is supposed to do, but it is the duty of a conductor to make them. [fol. 54] Q. And this report here that Mr. Barton has, what happened up in front is what somebody told you; is that correct?

A. Right.

Q. You were not in a position to know?

A. I couldn't see the front end.

Q. Virgil, I notice that the date up here is blank. It doesn't show what date, month or anything this report was made, does it?

A. It doesn't. I don't see it.

Q. As I understand it, part of the time after the spill you were on the floor; is that correct?

A. Yes, sir.

Q. And being on the floor, you have no idea, no way of judging the distance you traveled?

A. No. It would be hard to say.

Q. And you have no way of knowing when anybody filled out that report have you, since it doesn't have a date on it?

A. No. I see a date they got stamped on there, December 1953. But this happened on February 1, 1951.

Mr. McNamara: Right. I think that is all.

Recross Examination.

By Mr. Barton:

Q. Now, Mr. Herdman, there is a date on this report, is there not?

A. I see a stamped date down there at the bottom, but I don't see one up at the top.

Q. Isn't on this report the date of the accident 2/1/51, [fol. 55] which is February 1, 1951, at 3:28 p. m." Isn't that on this report?

A. Yes, but that report wasn't made on February 1st.

Q. Well, no. You said you made the report the next day.

A. It happened on February 1st.

Q. That is right. Isn't that what that says, "The date of the accident February 1, 1951; time of day, 3:28 p. m." Isn't that on that report?

A. That is there, but I looked here where it says February, and it didn't say the date or the year.

Q. That says, "Report for the month of February", doesn't it, Mr. Herdman, the official report that you made after this accident occurred as conductor in charge of this train?

A. We was required to do that and I did it to the best of my ability.

Q. And if some of the information here is information that had been given to you by other members of the crew, it was the information that was given to you immediately or shortly after the accident, wasn't it?

A. Yes, sir. I haven't seen any of the crew since we completed our run.

Mr. Barton: That is all.

Re-redirect Examination.

By Mr. McNamara:

Q. Can you state definitely, yes or no, whether or not that is your handwriting on the report?

A. It looks like my signature, Mac.

Q. But the report that is made out above that signature?

A. It is not my handwriting.

[fol. 56] Mr. McNamara: That is all.

Re-recross Examination.

By Mr. Barton:

Q. But you didn't sign a blank report, did you, Mr. Herdman?

A. I was suffering pretty much. I don't remember what I might have done.

Q. As the conductor, though, in charge of this train and required to make a report, you wouldn't sign a blank report, would you?

A. My knowledge would teach me not to, but I might have.

Mr. Barton: You might have. All right. That is all.

By Mr. McNamara:

Q. It is also possible somebody else filled out the report and handed it to you to sign?

A. That was the way it happened, but I could have. I don't remember if I read it or not, but I ordinarily wouldn't sign something without reading it.

Mr. McNamara: That is all.

Mr. Barton: That is all, Mr. Herdman.

The Court: That is all.

Afternoon Session

Monday, January 25, 1954.

Court met pursuant to adjournment. The jury being present and counsel being present as heretofore noted, the following proceedings were had:

[fol. 57] Court's Statement

The Court: Ladies and Gentlemen of the Jury, I think some of you may know or have heard me express in the past, in the last two or three weeks, that the duty of the Court is to pass upon questions of law, and I have told you, and the duty of the jury is to pass upon questions of fact, and these questions of law arise at various stages of the case, and very frequently at the conclusion of the plaintiff's case a question of law arises which presents

a question as to the sufficiency of the plaintiff's case; that is, if we assume that everything that has been submitted in the plaintiff's case is true, would that be enough to warrant a verdict in his favor, or would it make a case legally? And such a motion has been raised in this case and when such a question of law is raised, it is necessary for the judge to decide that question.

So, in this case I have decided that question and have decided that I would be compelled to sustain the motion of the defendant for a directed verdict, and so in due time, I will request that you sign a verdict for the defendant in accordance with my instructions. But first I shall try to explain to you what this question is and why I decide it as I do.

This is a case in which the testimony, as you have observed, is only the testimony of the plaintiff, who was in the caboose at the time this train stopped and has no knowledge of what happened, other than he knows that an emergency stop was made.

There is a doctrine of the law known as *res ipsa loquitur*, which means, in ordinary language, the thing speaks for itself, and the effect of that is that in certain kinds of accidents and under certain circumstances all the plaintiff has to do is to show that an accident happened under such [fol. 58] circumstances that it would not ordinarily happen and then that raises an inference of negligence, and when such a situation arises and there is an inference of negligence, then the plaintiff is entitled to have the case presented to the jury and to have the defendant's explanation and have the jury then to decide the question.

Whether or not a case is one to which the doctrine of *res ipsa loquitur* applies is a question of law for the judge to decide. So, I have decided in this case that this is not the sort of accident or situation in which the doctrine of *res ipsa loquitur* applies. In order for it to be such a case, it would have to be a situation, a set of facts where the accident happened is something that would not happen in the ordinary course of events. In this case, it would have to be that an emergency stop would not happen in the ordinary course of operating a railroad.

The plaintiff has testified in this case that he has been in a caboose some five, six or seven times, at least when an

emergency stop was made and that you always have to expect an emergency stop to be made, and that there isn't anything that you can do about it.

Obviously, when an emergency stop has to be made, the very nature of the emergency is that it is done immediately and in a freight train no opportunity for warning, as the plaintiff has testified to.

Now, for the plaintiff to recover against the defendant in this case, he must show negligence against the defendant; that is, he must show that he was injured through the negligence of the defendant acting through some of its employees. I think, as may have been said to you on your *voir dire* examination, that this is not a situation like we [fol. 59] have in Ohio, under the Workman's Compensation Law, where all a person has to do is to show that he was injured while in the performance of his duties. This case comes under a federal law, that is, a law passed by the Congress of the United States, and its only provision is that an employee who is injured may recover against the defendant for the negligence of the defendant. And so, the Court comes to the conclusion that this is not the sort of case where negligence may be inferred and there is no proof of negligence.

The plaintiff claims first that the defendant failed to provide plaintiff with a reasonably safe place to work. But there is no evidence that this caboose was any different than any other caboose, or that if it had been different this accident would not have happened. And then he also claims that the defendant failed to warn the plaintiff of the emergency stop. But as he himself has testified, it is impossible for the engineer or fireman to warn him of an emergency stop.

And his second charge is that the operator of the train operated the train so as to throw it into emergency stop causing the plaintiff to be thrown from one end of the caboose to the other. There is no evidence of that and if the evidence were to develop in this case that the engineer did make an emergency stop and that he was in the exercise of ordinary care in making that emergency stop, then the defendant would be entitled to recover a verdict. In other words, it is perfectly proper and legal to make an emergency stop when, as and if it is necessary.

Now, as I say, I have decided this question of law and disposed of this case by a decision on a question of law, and that is the Court's responsibility; that is, I assume full responsibility for this decision. If this case is ap-
[fol. 60] pealed, the decision that is appealed is my decision and it is my full responsibility. Under the law there is no other way to carry out that provision of the law, except to ask the jurors, or, rather, to direct the jurors to sign a verdict for the defendant.

You may or may not have reached this conclusion if you had heard all of the evidence in the case, but you have taken an oath to decide this case according to the law and the evidence, and this is a situation where you must determine it entirely on the law as directed by the judge; and I too, have an oath to perform my duties, and it is as much incumbent upon me to carry out my duty to direct a verdict, if that is what is indicated, as it is to let the case go to the jury, when that is indicated.

So, we are here under oath to perform our duties and at this time I request that you sign this verdict for the defendant. The clerk will pass it around.

Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 61-62] IN UNITED STATES DISTRICT COURT

DIRECTION TO ENTER JUDGMENT—Filed January 25, 1954

To the Clerk:

Enter judgment in the above-entitled case. On verdict for Defendant.

(S.) Lester L. Cecil, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION FOR NEW TRIAL—December 17, 1954

Plaintiff's motion for a new trial is overruled. Exceptions to plaintiff.

(S.) Lester L. Cecil, Judge.

Approved: (S.) Kenneth Agee, Attorney for Plaintiff.
(S.) Robert L. Barton, Attorney for Defendant.

[fol. 63]

Proceedings in the United States Court of Appeals For the Sixth Circuit

---

[fol. 64] CAUSE ARGUED AND SUBMITTED—December 3, 1955
Before Simons, Chief Judge, McAllister and Stewart, Circuit Judges

This cause is argued by Donald S. McNamara for appellant and by John Eckler for appellee and is submitted to the court.

JUDGMENT—Filed December 13, 1955

Appellant is a freight conductor employed by the appellee railroad company. He brought this action under the Federal Employers' Liability Act for injuries he received while riding in the caboose of a freight train in the course of his employment. This appeal is from the judgment of the district court entered upon a directed verdict for the appellee railroad.

The appellant himself was his only witness at the trial. He testified that his injuries were received when he was thrown to the floor of the caboose by an emergency stop made by the train at a time when it was proceeding at a speed of from eight to ten miles an hour. An official re-

port signed by him after the accident stated that the emergency stop had been made to avoid striking an automobile at a grade crossing.

We think the district judge correctly performed his duty in directing a verdict for the appellee. There was "a complete absence of probative facts to support the conclusion" of negligence. *Lavender* v. *Kurn*, 327 U. S. 645 (1946). And negligence remains the sole basis of liability under the Federal Employers' Liability Act. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1943).

The judgment is affirmed.

[fol. 65] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed April 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.